

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MARCH SESSION, 1995

**FILED**

**October 25, 1995**

**Cecil Crowson, Jr.**  
Appellate Court Clerk

STATE OF TENNESSEE )  
 )  
 APPELLEE )  
 )  
 V. )  
 )  
 DANIEL JOSEPH HARMON, JR. )  
 )  
 APPELLANT )

NO. 01C01-9412-CR-00412  
DAVIDSON COUNTY  
HON. ANN LACY JOHNS, JUDGE  
(Aggravated Kidnapping; Rape  
and Assault)

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AFFIRMED

OPINION FILED: \_\_\_\_\_

JERRY SCOTT, PRESIDING JUDGE

## OPINION

The appellant was convicted of aggravated kidnapping, rape and assault. For the kidnapping, he received a sentence of nine years and six months. He received a like sentence for the rape. He also received a sentence of eleven months and twenty-nine days for the assault. He was designated a Range I standard offender and his sentences are to be served concurrently. On appeal he has presented one issue, contending that the trial judge erred by admitting character evidence.

## **FACTS**

The victim and the appellant had lived together in Louisiana beginning in 1987 and had a son together. According to the victim, he was physically abusive to her "throughout the whole time" and she moved to Nashville in June 1991. One of the problems with their relationship was that he continued to date other women while living with her.

In April or May of 1992, the appellant moved to Nashville and attempted to renew their relationship. Before long, the abuse began again and the appellant also continued seeing other women. In late October of 1992, the appellant threw her around the room and kicked her in the face. Although she went to the hospital for medical assistance, she did not report the incident. She did however obtain an Order of Protection against the appellant the following month.

In spite of the Order of Protection, the appellant continued to come around the victim and to call her at the Pizza Hut in Hermitage where she worked. On February 22, 1993, the appellant called her "a couple of times" at her place of employment, demanding that she come to his apartment "or he was going to come and get (her)." She continued to refuse. In a short while the appellant went to the Pizza Hut and when the victim refused to leave with him, he grabbed her by the arm and started pulling her through the door. One child in

the restaurant got caught behind the door as they struggled. The victim released the door and was taken outside by the defendant and pushed up against the wall. As he tried to force her into his car, two customers came out of the restaurant demanding that he let her go. He did so and she returned to her work and reported the incident to the police. As a result of this incident, her arm was bruised, her hand was cut and her leg was bruised.

The appellant continued to go to the Pizza Hut while she was working to try to get her and she notified the police, but he always left before they arrived.

On March 8, 1993, the appellant called the victim and told her that he needed to use her car to go to the doctor. She refused to give it to him and eventually hung up the phone. Almost immediately, he called again, continuing to ask for her car. Again she refused and hung up the phone. About thirty minutes later, as she was walking to her car, the appellant came walking toward her and told her to get into the car. She did not make any outcry or try to run because she knew the appellant would catch her and if he did, "it would be worse." After they got in the car, the victim drove toward her place of employment, and the appellant hit her several times on her head, neck, ribs and stomach area. At one time he grabbed her around the neck and banged her head against the window. As they neared the Pizza Hut, he then directed her to drive to his apartment complex. When they arrived, he took her car keys and told her to get out of the car and go inside. He forced her to go into his bedroom where he locked the door, started screaming at her and "punched" her again in the side. He forced her into the bathroom and told her to take her clothes off and get into bed. When she did not immediately do so, he pushed her into the bedroom, again told her to take off her clothes and to stop crying. Eventually she took off her clothes and got into bed as she had been told. The appellant then sexually penetrated her, after which he told her to get ready for work. He took her to the Pizza Hut and "dropped (her) off," telling her that he was keeping

her car until 5:00 P.M.

The state introduced other evidence to corroborate her testimony about the events.

The appellant testified in his own behalf. In his direct testimony, he told his version of the events, denying assaulting the victim at the Pizza Hut, denying kidnapping her and contending that the sexual intercourse was consensual. In fact, it was her idea, not his. He testified that while he and the victim had a stormy relationship, he did not commit any of the offenses with which he was charged.

As noted, during direct examination, the appellant testified that he and the victim had a "stormy relationship." Also, while relating to the jury a conversation between himself and the victim, the appellant mentioned that the victim had filed an aggravated assault complaint against him concerning an incident unrelated to the present case. Finally, concerning the Pizza Hut incident for which he was ultimately convicted of assault in this case, the appellant characterized his conduct as "aggressive," since he "had had it with her."

On cross-examination of the appellant, the initial question posed by the prosecutor was whether the appellant has a violent temper. The appellant answered in the negative. The appellant did admit however, that he often pushed the victim when they argued, sometimes resulting in bruises to the victim. Thereafter, the state questioned the appellant as to whether he lost his temper during the incident that led to the assault charge or during the incident that led to the rape charge. The appellant answered in the affirmative concerning the former incident and in the negative concerning the latter.

The state next asked the appellant whether he had threatened to retaliate

against his cousin if his cousin testified against him. The appellant denied that such conduct occurred. He also denied losing his temper with his cousin or "stomping" his cousin's head. Instead, the appellant testified that he engaged in a "little scuffle" with his cousin.

The state's final line of questioning on this issue involved Janet Morgan, a lady whom the victim believed had romantic relations with the appellant. The defense lodged an objection when the prosecutor asked the appellant whether he had ever lost his temper with Ms. Morgan. The trial court overruled the objection, holding that the appellant had "submitted himself . . . to attac[k] on his character" by testifying in his own behalf. The appellant then answered that he had lost his temper with Ms. Morgan before. He subsequently denied having threatened to retaliate against her if she testified against him. Finally, the state questioned the appellant about photographs of Ms. Morgan which were taken after she had engaged in an argument with the appellant. This line of questioning clearly suggested that the photographs depicted an injured Ms. Morgan. The photographs were not viewed by the jury.

## **DISCUSSION**

The appellant contends that the state's cross-examination of him was directed to elicit inadmissible character evidence concerning his violent temper. He submits that Rule 404(a), Tenn.R.Evid., precludes the admission of this evidence because the state attempted to use the evidence to suggest to the jury that the appellant acted in conformity with the character trait in committing the offenses for which he was convicted. Moreover, he argues that the erroneous admission of this evidence prejudiced the outcome of the trial.

For purposes of discussion, this Court has divided the cross-examination at issue in this appeal into two categories: (a) questions proffered and answered without objection at trial and (b) the question followed by a prompt objection.

During the course of the cross-examination of the appellant, there were no objections pertinent to this appeal, with the exception of one objection to the question by the state concerning Ms. Morgan. Thus, the initial impediment to the appellant's appeal, at least concerning the first category of questioning, is the contemporaneous objection rule.

The contemporaneous objection rule is alive and well in Tennessee. In substance, the rule states that the failure of defense counsel to make a contemporaneous objection waives consideration by the Court of the issue on appeal. See Rule 36(a), Tenn.R.App.P.; Teague v. State, 772 S.W.2d 915, 926 (Tenn.Crim.App. 1988); State v. Killebrew, 760 S.W.2d 228, 235 (Tenn.Crim.App. 1988). The appellant attempts to circumvent this rule by petitioning this Court to find that it was plain error under Rule 52(b), Tenn.R.Crim.P., for the trial court not to prevent the questions regarding the appellant's violent temper. We, however, are not persuaded, after a careful review of the record and applicable legal standards, that the errors allegedly committed by the trial court rise to the level of plain error. Thus, issues arising out of the first category of questioning were waived.<sup>1</sup>

As stated previously, the second category of alleged error pertains exclusively to the question propounded to the appellant concerning the nature of his conduct in his relationship with Ms. Morgan. Specifically, the state asked the appellant whether he had ever lost his temper with Ms. Morgan. Defense counsel immediately interjected an objection. The trial court ruled that the appellant "submitted himself by taking the stand to attach(sic) on his character or attempt to attack on his character." The appellant then admitted that he lost his temper with Ms. Morgan on an Easter morning.

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<sup>1</sup>Indeed, the "stormy" relationship or the lack thereof between the appellant and the victim was at the heart of the evidence presented by both sides.

Upon further questioning as to what he did that day, he volunteered an account of an incident which began with Ms. Morgan breaking into his house and concluded with him throwing her against a wall as he attempted to remove her from the house. The appellant was next asked to identify photographs taken after that incident, which the appellant said depicted injuries suffered by Ms. Morgan when she hit the wall. The state requested the permission of the trial court to make the photographs exhibits and pass them to the jury. At this point, the trial judge intervened and cautioned the state to not "cross the line into propensity evidence." The state responded by withdrawing its request to pass the photographs to the jury and by terminating that line of inquiry.

The appellant argues that this portion of the cross-examination resulted in the erroneous admission of character evidence concerning his violent temper. We concur. See Rule 404(a), Tenn.R.Evid. The trial court's position that the appellant voluntarily submitted himself to this portion of the attack merely by taking the witness stand is untenable. State v. Patton, 593 S.W.2d 913, 917 (Tenn. 1979)(citations omitted). Rule 404(a)(1), Tenn.R.Evid., the provision which provides a limited exception to the general prohibition of admitting character evidence of an accused, states that character evidence may be admitted only where the "pertinent character trait [is] offered by the accused or by the prosecution to rebut the same." In other words, the prosecution cannot introduce evidence of a defendant's violent temper or other character trait, except in rebuttal of evidence introduced by the defendant concerning that same trait. Thus, it is clear that the accused must "open the door" by affirmatively choosing to place his character at issue before the state may present any evidence in this regard. Rule 404(a)(1), Tenn.R.Evid.; State v. West, 844 S.W.2d 144, 149 (Tenn. 1992).

In this case we agree that the appellant placed his peacefulness or tranquility at issue. The testimony given by the appellant, including his references to his "stormy relationship" with the victim and the aggravated assault complaint filed against him by the victim, placed the peacefulness of his relationship with the victim in issue, but not his "character" for purposes of Rule 404(a)(1).<sup>2</sup> Accordingly, it was error for the trial court to permit examination of the appellant concerning the nature of his interaction with Ms. Morgan.

The question remains, however, whether the impermissible questions and resultant answers prejudiced the outcome of the trial. Because of the overwhelming evidence of guilt on each of the charges, we find that the error was harmless beyond any doubt. Rule 52(a), Tenn.R.Crim.P.; Rule 36(b), Tenn.R.App.P.; see also West, 884 S.W.2d at 150. Given the detailed testimony by the victim concerning each offense, as well as the other corroborative proof that was presented at trial, it is implausible to believe that the jury would not have rendered the same verdicts had there been no questioning or testimony concerning the affray with Ms. Morgan. In fact, the outcome would have been the same even if the trial had been entirely devoid of character evidence pertaining to the appellant.

Accordingly, we affirm.

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<sup>2</sup>Moreover, we are unable to fathom any other legal theories which would permit such examination of the appellant. While we agree with the state that it had a right to inquire to what the appellant meant when he characterized his relationship with the victim as "stormy," we fail to see how this inquiry could relate to the personal interaction between the appellant and Ms. Morgan. Furthermore, the state's contention that its examination of the appellant about his temper was for the purpose of attacking his credibility is also unpersuasive on this issue; once again, all of the evidence that could support such a line of questioning pertains solely to the relationship between the appellant and the victim.



JERRY SCOTT, PRESIDING JUDGE

CONCUR:

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JOSEPH M. TIPTON, JUDGE

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DAVID G. HAYES, JUDGE