

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER SESSION, 1992

FILED

December 19, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE)
)
 APPELLEE)
)
 V.)
)
 HAROLD WAYNE NICHOLS)
)
 APPELLANT)

NO. 03C01-9108-CR-00236
HAMILTON COUNTY
HON. DOUGLAS A. MEYER, JUDGE
(First Degree Burglary; Aggravated
Rape; Larceny)

FOR THE APPELLANT:

Hugh J. Moore, Jr.
Rosemarie L. Bryan
Arnold C. Moore, Jr.
Attorneys at Law
1100 American Natl. Bank Bldg.
Chattanooga, TN 37402

FOR THE APPELLEE:

Charles W. Burson
Attorney General

Rebecca L. Gundt
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0485

Gary D. Gerbitz
District Attorney General

Steven Bevil
Asst. Dist. Attorney General
2nd Floor, Criminal Justice Bldg.
Chattanooga, TN 37402

AFFIRMED

OPINION FILED: _____

JERRY SCOTT, PRESIDING JUDGE

OPINION

Consolidated in this appeal are fourteen separate issues, stemming from five trials of the appellant, Harold Wayne Nichols. The appellant, a thirty-three year old white male, received a sentence of death¹ and sentences totalling 647 years imprisonment for various crimes committed against fourteen young women, including aggravated rape, first degree murder, felonious assault with intent to commit murder, petit and grand larceny and burglary. To six of the original 41 charges lodged against him, the appellant entered his plea of guilty. Another sixteen were dismissed by the state and on the remaining indictments the appellant was tried and convicted.

The appellant was indicted on numerous charges stemming from a series of attacks against a number of women. In each case, the appellant was convicted of aggravated rape committed after breaking into the home of his victim. The appellant killed his first victim, Karen Pulley, and assaulted each of the others, both physically and sexually, during December 1988 and January 1989. He was arrested in January 1989.

For convenience, all charges stemming from each attack were consolidated and tried separately from those relating to other victims. Thus, fourteen trials were originally set. From his convictions in five trials, the appellant now appeals and presents fourteen issues for review. His contentions can be summarized as follows:

¹The direct appeal of the death sentence has been decided adversely to the appellant by our Supreme Court. State v. Nichols, 877 S.W.2d 722 (Tenn. 1994). Certiorari was denied by the United States Supreme Court. ____ U.S. ____, 115 S.Ct. 909, 130 L.Ed.2d 791 (1995).

1. The trial court erred when it ordered two cases transferred from Hamilton County for the purpose of jury selection only and then transferred back to Hamilton County for trial over the appellant's strong objection.
2. The trial court erred in denying a continuance when, on the morning of trial, the appellant was re-indicted on each of three charges lodged against him.
3. The trial court erred in sentencing the appellant because it refused to consider an improperly prepared presentence report, because it reviewed highly prejudicial victim impact statements, because it refused to consider certain mitigating factors put forth by the appellant, and because it allowed the state to seek enhanced punishment without providing the requisite notice to the appellant.
4. The trial court erred in scheduling the trials in an order other than chronological and then erred further when it refused to sentence the appellant in the order in which his cases were tried.
5. The trial court erred when it refused to dismiss the indictments returned by the Hamilton County grand jury, which had been unconstitutionally selected.
6. The trial court erred when it denied the appellant's motion to withdraw his guilty pleas in the Tate case, wherein evidence was withheld from him until after the pleas were entered.
7. The trial court erred when it admitted into evidence a videotaped confession made by appellant, which was taken after he was refused counsel and was taken under coercive circumstances.
8. The trial court erred in failing to redact portions of the videotaped statement made by the appellant.
9. The trial court erred when it denied the appellant's motion for a continuance after he discovered that certain exculpatory evidence had either been lost or withheld from him.
10. The evidence was insufficient to support the appellant's convictions of aggravated rape.
11. The trial court erred when it refused to dismiss two of the rape charges lodged against appellant after the state failed to prove the allegations made in the indictment, i.e., that bodily injury had been caused by the acts described in the indictment.
12. The trial court erred in denying appellant's motion for a mistrial after the District Attorney General announced the name of a victim other than the one he intended to call to the witness stand.

13. The trial court erred when it refused to forbid the formal reading of the indictment.

14. The trial court erred when in failing to strike the jury panel after a prospective jury made an inflammatory statement during voir dire.

I. CHANGE OF VENUE

The appellant challenges the trial court's response to his motion for a change of venue in the Roach and Gore cases. Believing that pre-trial publicity had precluded the possibility of empaneling a fair and unbiased jury in Hamilton County, the appellant moved for a change of venue, pursuant to Tenn.R.Crim.P. 21(a).² The court granted the motion but only for the limited purpose of jury selection. Thereafter, juries were selected in Loudon and Coffee Counties and transported to Hamilton County to hear the Gore and Roach cases. In both instances the jurors were sequestered for the duration of the trials and returned verdicts of guilt against the appellant.

The appellant objects, as he did in the court below, to the trial court's order limiting the change of venue to jury selection only. Asserting that the transportation of the Loudon and Coffee County jurors back to Hamilton County constituted a second change of venue, to which the appellant never consented, the appellant argues that the trial court abused its discretion and violated his constitutional and statutory rights under Article I, Section 9 of the Tennessee Constitution³ and

²"In all criminal prosecutions the venue may be changed upon motion of the defendant, or upon the court's own motion with the consent of the defendant, if it appears to the court that, due to undue excitement against the defendant in the county where the offense was committed or any other cause, a fair trial probably could not be had." Tenn.R.Crim.P. 21(a).

³"That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or presentment, a speedy public trial, by an impartial jury of the County in which the crime shall have been committed, and shall not be compelled to give evidence against himself." Article I, Section 9, Tennessee

under Rule 18(a) of the Tennessee Rules of Criminal Procedure.^{4,5} This contention raises an issue of first impression in this Court.

However, our Supreme Court has specifically addressed this issue in the direct appeal of the appellant's death penalty case. There, the same trial judge utilized the same procedure, i.e., he granted the appellant's request for a change of venue to Sumner County, where he selected the jury and then ordered the case back to Hamilton County for trial. State v. Nichols, supra, 877 S.W.2d at 725.

Describing the question as one "of first impression," 877 S.W.2d at 727, and the procedure as "unorthodox," 877 S.W.2d at 728, our Supreme Court noted that the trial judge was "commendably concerned that, if the trial were held in a distant county, the defendant's family and others would be prevented from attending." Id. The Supreme Court concluded that the procedure was not reversible error and encouraged the legislature to address this issue to "ensure uniformity and fairness across the State" while avoiding error from "excessive experimentation. Id., 877 S.W.2d at 729.

Since the Supreme Court is the supreme judicial tribunal of the state, its adjudications and precedents are final and conclusive upon all inferior tribunals, including, of course, this intermediate appellate court. Barger v. Brock, 535 S.W.2d 337, 341 (Tenn. 1976). Thus, this Court is

Constitution. (emphasis added)

⁴"Except as otherwise provided by statute or by these rules, offenses shall be prosecuted in the county where the offense was committed" Rule 18(a), Tenn.R.Crim.P.

⁵The appellant also cites Article I, §§ 6, 8 and 16 of the Tennessee Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Tenn.R.Crim.P. 18 and 21, but makes no argument under those constitutional or rules provisions.

powerless to find this procedure was improper, even if its members wanted to do so. This issue has no merit.

II. DENIAL OF A CONTINUANCE

In the Gore cases, the appellant was originally indicted for burglary in the first degree, petit larceny and aggravated rape, all of the offenses occurring on December 20, 1988. Six days before jury selection began, the grand jury returned superseding indictments charging that these offenses occurred on or before December 21, 1988. The indictment in the rape case originally charged the appellant with rape by "sexual penetration" while armed with a knife, thereby causing personal injury to the victim. The amended indictment charged the appellant with rape of the victim by "sexual penetration," to-wit: vaginal intercourse, while armed with a knife, "and the Defendant caused personal injury" to the victim. (Emphasis added) The appellant argues that the semantic changes in the indictment created "an entirely new charge to defend," thus prejudicing him.

The state counters with its argument that the amended indictment did not change the offense, but added the requirement that the state prove that the rape occurred by vaginal penetration and not by any other type of sexual penetration. Thus, the state contends that the appellant was in no way prejudiced by the change and that the state's burden of proof was actually enhanced by the new indictment.

The appellant also complains that there was confusion regarding the date of the offense in that the original incident report indicates it occurred on December 20, 1988, the medical report shows (quite logically) that the victim was admitted to the hospital on the morning of December 21, 1988, and another report showed the offense occurred on

December 12, 1988. The appellant and his counsel were aware of all of those dates and argued to the jury about the confusion.

The decision to grant or deny a motion for a continuance rests within the sound discretion of the trial judge and will not be disturbed on appeal unless there has been "a clear showing of abuse of that discretion." State v. Butler, 795 S.W.2d 680, 684 (Tenn.Crim.App. 1990). Furthermore, a defendant is not entitled to relief on appeal when his trial is held less than fourteen days after the return of the indictment unless he can demonstrate that he has been prejudiced. State v. Brown, 795 S.W.2d 689, 693 (Tenn.Crim.App. 1990).

The appellant has, in no way, demonstrated that he was prejudiced by the denial of a continuance. He and his counsel were fully aware of the alleged date of the offense and the type of sexual penetration alleged long before the superseding indictment was returned and this issue has no merit.

III. THE TRIAL COURT ERRED AT THE SENTENCING HEARING.

Since a sentencing issue has been raised in this appeal, we have conducted a de novo review on the record, with a presumption that the determinations of the trial judge were correct. Tenn. Code Ann. § 40-35-401(d).

The appellant contends that the court erred at the sentencing hearing of these cases⁶ by: (a) allowing an "illegal" pre-sentence report to be entered into the record and then refusing to consider the report; (b) reviewing highly prejudicial victim impact statements; (c) refusing to

⁶This section applies to the sentencing in the Gore, Roach, Tate, Roszell, and Pulley cases.

consider mitigating factors; and (d) allowing the state to seek enhanced punishment without the requisite notice to him. He argues that since his sentences were not imposed in accordance with the law, he is entitled to a new sentencing hearing. These arguments are without merit.

A. *The court erred by allowing the admission of an "illegal" pre-sentence report and then refused to consider it.*

The appellant first argues that the trial judge allowed an illegal pre-sentence report to be entered into the record. Tennessee law requires a trial court to direct the preparation of a pre-sentence report before sentencing in felony cases. Tenn. Code Ann. § 40-35-205(a) (1995). The pre-sentence investigation is mandatory except where the court accepts a sentence agreement between the District Attorney General and the defendant. Tenn. Code Ann. § 40-35-205(d) (1995). In addition to several other requirements, the statute governing the preparation of pre-sentence reports provides that the preparer of the report shall not "include a recommendation for confinement of any defendant unless otherwise required by law." Tenn. Code Ann. § 40-35-207(b) (1995).

The appellant argues that the court allowed an illegal pre-sentence report to be entered into the record because the pre-sentence officer commented on and recommended punishment in the cases. In the report, the officer stated that the appellant's actions "earned him the maximum penalty allowable under law for each crime of which he is convicted." The appellant further asserts that the remedy offered by the court, to-wit: ignoring the report, did not cure the error because Tenn. Code Ann. § 40-35-205(a) requires the court to consider such reports.

Actually the statute does not require the consideration of pre-sentence reports. It only requires their preparation. The requirement that

the judge consider such reports is, of course, implicit in the statute.

The appellant has overlooked several details that this Court finds to be dispositive of this issue. The record shows that the appellant requested a continuance due to the error made by the pre-sentence officer. However, he failed to note in his brief that the trial judge offered to ignore the offending portion of the report, in effect, redacting the improper language from the report. When the appellant refused to accept that option and renewed his motion for a continuance of the hearing, the trial judge took the next logical step and decided to not consider the report at all, but did not grant his continuance.

This error was harmless and does not require a new sentencing hearing. It is clear that the grant or denial of a motion for continuance rests within the sound discretion of the trial court and that discretion will not be disturbed absent a clear showing of abuse. State v. Butler, supra. There was no such abuse in this case. As noted above, the trial judge was willing to redact the two sentence section of the report regarding the sentencing recommendation. When the appellant refused to accept that remedy, the judge acted within his discretion by refusing to consider the report. Even though the judge erred by not considering the report, the appellant cannot capitalize on the error because he invited it by not accepting the extremely logical and appropriate remedy offered by the trial court. "(A) party cannot take advantage of errors which he himself committed or invited, or induced the trial court to commit, or which were the natural consequence of his own neglect or misconduct." State v. Garland, 617 S.W.2d 176, 186 (Tenn.Crim.App. 1981), citing numerous cases and Tenn.R.App.P. 36(a).

B. The Court erred in the sentencing hearing by reviewing victim impact statements.

The appellant next argues that the trial court erred in the sentencing hearing by reviewing "the highly prejudicial victim impact statements," and a "victim impact" letter. He contends that not only were the statements highly prejudicial, but that they were not filed and presented to the parties within the ten day period required for the filing of the pre-sentence report. Tenn. Code Ann. § 40-35-208 (1995).⁷

This argument is also without merit. The record reveals that the pre-sentence report was filed and presented within the required period. If the impact statements had been submitted within ten days of the hearing, the trial court would have been able to review them regardless of their prejudicial effect, since Tenn. Code Ann. § 40-35-207(a)(8) specifically empowers the preparer of pre-sentence reports to include "(a)ny statement relating to sentencing submitted by the victim of the offense or the investigative agency." In light of these circumstances, the trial judge acted appropriately and logically by simply refusing to consider the victim impact statements. The state is correct in asserting that there is no indication that these statements were ever considered by the trial court. Indeed, the record reveals that the trial judge did not consider the statements. The fact that they merely existed did not result in any prejudice to the appellant. Indeed, it is hard to conceptualize how the appellant was prejudiced by victim impact statements that the trial judge refused to consider, since there was obviously nothing favorable to the appellant in the statements.

C. The court erred by refusing to consider mitigating factors in sentencing.

The appellant further argues that the trial judge erred by refusing to consider his proffered mitigating factors in sentencing. Actually, he

⁷The pre-sentence officer filed the "victim impact letter" on December 13, 1990, the day before the sentencing hearing.

contends since the court refused to find the existence of the mitigating factors set forth by the defense, the sentence imposed by the court was excessive. He concludes that this action by the trial judge violated Tenn. Code Ann. § 40-35-103(4), which requires the trial court to impose "the least severe measure necessary to achieve the purposes for which the sentence is imposed." He also invokes the Eighth Amendment's prohibition of cruel and unusual punishment, the Fifth Amendment's requirement of due process of law, and Article I, §§ 8 and 16 of the Tennessee Constitution.

The record in this case shows that the trial court did indeed consider all the relevant statutory mitigating factors, but did not find them to be present in this case. That is a far cry from refusing to consider proffered mitigating factors. The trial judge noted that the only mitigating factor that was applicable to the defendant was whether he had a mental or physical defect which would significantly reduce his culpability for the offense. Tenn. Code Ann. at § 40-35-113(8). We agree with the trial judge's finding that the appellant was not suffering from a cognizable condition that would negate culpability. The defense failed to persuade the trial court or this Court that he suffered from any such excusing condition.

The trial judge also considered "(a)ny other factors consistent with the purposes" of the act. Tenn. Code Ann. § 40-35-113(13). The trial judge considered the appellant's troubled childhood, but did not consider that his troubled past was a mitigating factor. Though it is unfortunate that the appellant was physically and emotionally abused as a child, he was aware of the psychological damage that he had suffered and the consequences, but he apparently chose to do nothing to overcome the effects of the abuse.

D. The court erred by allowing the State to seek enhanced punishment without requisite notice to the defendant.

Under this issue, the appellant finally argues that the trial court erred by allowing the state to seek enhanced punishment without giving him the requisite notice required by the Tennessee Rules of Criminal Procedure. The state must provide at least ten days notice before the sentencing hearing when seeking enhanced punishment. Otherwise, the trial judge "shall grant" the defendant a continuance of the trial, if sought by the defendant. Tenn.R.Crim.P. 12.2(a); See also, Tenn. Code Ann. § 40-35-202(a)(placing the same requirement on the prosecution). The defense contends that since the state failed to provide the required notices of enhancement for sentencing in each of the cases, including trials and pleaded cases, they were unable to prepare and present an appropriate strategy during the sentencing hearing. Moreover, by denying his motion for a continuance of the sentencing hearing, the trial court prejudiced his case.

This final contention is also without merit. Although the defense properly cites the law in support of his position, the record does not bear out his arguments. As the defendant correctly points out, the Tennessee Supreme Court has stated that the purpose of Tenn. Code Ann. § 40-35-202(a) is to provide fair notice to an accused that he/she will be exposed to other than standard sentencing. State v. Adams, 788 S.W.2d 557, 559 (Tenn. 1990). This Court has held that giving a defendant actual notice of the state's intent to seek enhanced punishment as a career criminal is sufficient. Crump v. State, 672 S.W.2d 226, 227 (Tenn.Crim.App. 1984). The record reveals that the state filed several notices of its intent to seek enhanced punishment for this defendant as a career criminal. While it is true that the state did not provide such notice for each trial and/or plea agreement, the defendant had actual notice of the prosecution's intention.

In addition, he and his counsel knew that his violent criminal history made him a prime candidate for enhanced sentencing.

In sum, the Court has considered the defense's argument that these "errors," individually and taken in the aggregate, constituted a substantial infringement of the defendant's statutory and constitutional rights. However, we find this argument to be without merit. The errors, even taken together, constituted nothing more than harmless error and the defendant was lawfully and appropriately sentenced. Tenn.R.Crim.P. 52(a), Tenn.R.App.P. 36(b). This issue has no merit.

IV. MOTION FOR SCHEDULING OF TRIALS

The appellant next contends that the order in which his cases were tried and the order in which his sentences were imposed constituted a violation of his right to due process of law. The appellant moved the trial court to schedule the multiple trials in chronological order. The state objected, according to the appellant, for the purpose of trying the felony murder case last and using the convictions in the other cases as aggravating circumstances to support a sentence of death. The trial court denied the appellant's motion. Further, the appellant waived his right to early sentencing following his first plea of guilty for the purpose of waiting until all of the cases against him had been tried. After the final verdict was entered, the trial court sentenced the appellant in the order in which the offenses were committed; that is, he was sentenced in the reverse order from that in which he was tried. The appellant now asserts that the trial court's scheduling of the trials and ordering of sentences violated his due process rights.

This is another issue which has already been addressed by the Tennessee Supreme Court in the direct appeal of this appellant's death

penalty case. There the Court held that, for the purposes of Tenn. Code Ann. § 39-13-294(i)(2) (the death penalty aggravating circumstance that the defendant has been previously convicted of one or more felonies ((emphasis in original Supreme Court opinion))), "the order in which the crimes were actually committed is irrelevant so long as the convictions have been entered before the (death penalty) sentencing hearing at which they were introduced." State v. Nichols, supra, 877 S.W.2d at 736. The Court went on to note that "the implementation of (that) aggravating circumstance may be subject to a certain degree of prosecutorial discretion; but implementation of the criminal laws against murder 'necessarily requires discretionary judgments.'" Id., citing McClesky v. Kemp, 481 U.S. 279, 299, 107 S.Ct. 1756, 1769, 95 L.Ed.2d 262 (1987).

Thus, the Supreme Court found no error in the trial of the appellant's cases "out of chronological order." State v. Nichols, supra, 877 S.W.2d at 735-36. As previously noted, such precedent is binding on this Court. Barger v. Brock, supra. The decision to sentence the appellant in "a reverse sequence" is no more error than the decision to try him "out of chronological order." This issue has no merit.

V. CONSTITUTIONALITY OF GRAND JURY SELECTION AND COMPOSITION

The appellant next asserts that the grand jury which indicted him in the Gore and Roach cases was unconstitutionally selected. Specifically, he attacks the Hamilton County Board of Jury Commissioners Act, 1931 Tenn. Priv. Acts, ch. 564. First, the appellant claims that the jury commissioners erroneously complied with the provisions of the Act, since Hamilton County's population no longer falls within the narrow range prescribed by the Act when it was enacted in 1931. Second, he contends

that the Act violates Article XI, Section 8, of the Tennessee Constitution,⁸ because no rational basis exists to support exempting Hamilton County from the general jury provisions found in Title 22 of the Tennessee Code Annotated. The appellant also asserts that the jury commissioners deviated from the provisions of the Act by allowing an unsworn assistant to select the venire. He also charges the jury commissioners with systematically excluding large classes of people from sitting as grand jurors, in violation of his right to be tried by a jury composed of a fair cross-section of the community.

This Court has recently addressed these very same issues as they pertain to the selection of grand and petit jurors in Hamilton County. In State v. Boyd, 867 S.W.2d 330, 337 (Tenn.Crim. App. 1992), this Court noted "that while the actions of the Hamilton County Jury Commission were not in full compliance with its prescribed procedures," the error was harmless. The Court addressed all of the issues alleged by this appellant and found them all to be without merit. Accordingly, his convictions were affirmed.

As previously noted, the issues raised by the appellant in this case exactly mirror those addressed in Boyd.⁹ Therefore, on the authority of that decision, we find this issue to be without merit.

The appellant raised one claim which was not considered in Boyd. He cites statistics which suggest that blacks were underrepresented in the

⁸"The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie, [immunities] or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law. ..." Article XI, Section 8, Tennessee Constitution.

⁹The evidence in Boyd and this case was presented at a single hearing for use in both cases. Therefore, the proof was exactly the same in each case.

venire panels chosen by the jury commissioners. He attempted to prove that by showing that from a sample of 750 prospective jurors certain zip codes were underrepresented. He contended that this proved that African-Americans were under represented on the entire venire. However, we note that the appellant has not definitively shown that blacks were systematically excluded. Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979). The limited size of the sample and the lack of proof of what zip codes cover more black citizens preclude such a dramatic finding in this case. Because the appellant has failed to prove his contention, we find this allegation to also be without merit.

VI. THE COURT ERRED BY REFUSING TO ALLOW THE APPELLANT TO WITHDRAW HIS GUILTY PLEA IN THE TATE CASES

The appellant contends that the trial judge erred by refusing to allow him to withdraw his guilty plea after it became apparent that the state had withheld allegedly exculpatory evidence from him.

There was a variance between the tape recorded statement given by the victim and provided to the defense and her typewritten statement which was part of her victim's compensation claim which was filed before the Tennessee Claims Commission, which the state did not provide to him prior to the entry of his guilty plea.

However, as the state points out in its brief, this inconsistency related to the charge of felonious assault which was dismissed as part of his plea bargain agreement. Thus, this issue has no merit.

VII. THE COURT ERRED WHEN IT ADMITTED THE APPELLANT'S VIDEOTAPED CONFESSION INTO EVIDENCE.

The appellant was arrested at 10:30 P.M. on January 5, 1989. After he was taken into custody he was transported to the East Ridge Police Department where he was questioned extensively concerning the death, assault, and rape of Karen Pulley and the rape and assaults on the other victims.¹⁰ The record indicates that he was read his Miranda rights at the station and signed several waivers of those rights in the ensuing days. His signatures on the waivers was witnessed by Larry Holland, a detective employed by the East Ridge Police Department. The appellant went on to provide the police with information concerning several assaults in the Chattanooga area.

The defense contends that the appellant's statement were not given voluntarily and that questioning should have stopped immediately after he was allegedly refused access to counsel. The appellant further testified that he was not read his rights at the time of his arrest. He contends that the circumstances of his arrest and questioning constituted a threatening situation that served to coerce him into making his statement. Thus, the defense contends that the statement that followed was inadmissible.

The Supreme Court has ruled that courts must consider such inquiries as the one before us by presuming that the defendant did not waive his rights. North Carolina v. Butler, 441 U.S. 369, 373, 99 S.Ct. 1755, 1757, 60 L.Ed.2d 286 (1979). When evaluating the voluntariness of a suspect's statement, the courts must consider "the duration of and conditions of detention . . . the manifest attitude of the police toward him, his physical and mental state, the diverse pressures which sap or sustain his power of resistance and self-control." Culombe v. Connecticut, 367 U.S. 568, 602, 81 S.Ct. 1860, 1879, 6 L.Ed.2d 1037 (1961).

¹⁰This section applies to the trial of the Gore and Roach cases only.

In support of these allegations, the defense relies upon testimony by the appellant that directly contradicts testimony given by the police officers present at the time of the questioning. The appellant testified that he requested that an attorney be present before he answered questions. He further testified that the officers conducting the interrogation refused to provide him with an attorney and continued to ask him questions. Furthermore, he alleged that when he made his request, the officers told him that they would have to awaken a judge in order to honor his request and that things would go better for him if he cooperated and answered the questions.

As is so often the case, the appellant's testimony is inconsistent with testimony given by officers who were present at the time of the questioning. Sergeant Daniel Dyer, of the Red Bank Police Department, testified that the appellant never asked for an attorney at the time of his arrest and that he was very cooperative during the investigation. Larry Holland, the detective who testified that he was present when the appellant made his statement, stated that the appellant was advised of his rights before he gave his statement and that he did not ask for an attorney at that time. The officers testified that the appellant never made such an unequivocal request, and that if he had, they certainly would not have endangered such an important investigation by denying an accused his right to counsel. Finally, the appellant acquiesced to the officers' requests by signing and initialing numerous waiver forms that demonstrated his knowledge of his rights.

We agree with the trial court's findings that the appellant was not coerced into making his statement and that he knowingly and voluntarily waived his rights to counsel. The trial judge's findings on a motion to suppress are conclusive on appeal unless the evidence preponderates

against the trial court's judgment. State v. Harbison, 704 S.W.2d 314, 318 (Tenn. 1986); State v. Turnbull, 640 S.W.2d 40, 45-46 (Tenn.Crim.App. 1982). The evidence certainly does not preponderate against the trial court's judgment.

In addition, even though it may have been appropriate for the police officers to advise the appellant of his rights at the time of his arrest, he was taken into custody pursuant to a valid arrest warrant and was advised of his rights before questioning, as required by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct.1602, 1626, 16 L.Ed.2d 694 (1966). Finally, the allegations made by the defense that the appellant was deprived of food and sleep during the investigation are not supported by the record. The appellant was arrested at approximately 10:30 P.M. and was questioned until approximately 4:21 A.M. He was then allowed to sleep for several hours before being questioned the next morning at 11:30 A.M. The conditions of his confinement were neither cruel nor unusual and did not serve to coerce him in any way. This issue has no merit.

VIII. THE TRIAL COURT ERRED BY NOT REDACTING PORTIONS OF THE APPELLANT'S VIDEOTAPED STATEMENT

The defense contends that the trial court should not have allowed into evidence that part of the appellant's statement potentially related to other cases.¹¹ He objects to the admission of portions of his statement concerning a knife that he brought to the crime scene but left outside the house. In addition, he objects to the admission of any reference that he made to the attempted break-in of the adjacent side to the Roach duplex. These arguments are without merit.

Any portion of a confession that indicates that the accused has

¹¹This section concerns the Roach case only.

been found guilty of another offense is "inadmissible if it can be separated from the portion of the confession relating to the charge in issue." Rounds v. State, 171 Tenn.511, 106 S.W.2d 212, 214 (1937). In that case, the Tennessee Supreme Court concluded that the trial court committed error by allowing into evidence portions of the defendant's statements relating to another robbery and shooting. Id., 106 S.W.2d at 215. The Court has also held that references to other crimes must be redacted from a defendant's statement even if doing so may violate the "best evidence rule." State v. Caldwell, 671 S.W.2d 459, 464 (Tenn. 1984)(redacted statement read to the jury rather than letting them hear the tape recorded statement given by the defendant).

The statement regarding the knife at the crime scene was admissible since it did not refer to another crime. The record indicates that the appellant took the knife to the Roach apartment that night but left it sticking in the ground outside the apartment. The victim testified that the appellant threatened her and her children with bodily harm if she did not accede to his wishes. It is unclear how the appellant intended to inflict such injury, but it is certainly conceivable that he may have intended to use the knife. There is nothing in the record to indicate that that knife was used in the commission of the other crimes.

The appellant's answers to questions relating to his attempted break-in of the adjacent apartment were admissible as well. While the statement referred to other crimes, the other crimes constituted evidence of a common scheme or plan involving the Roach break-in and assault. In State v. Peacock, 638 S.W.2d 837, 840 (Tenn.Crim.App. 1982), this Court held that evidence of another crime or bad act may be admitted into evidence if it is part of a common scheme or plan. The statement made by the appellant indicates that he attempted to break-in the neighboring

apartment immediately before breaking into the Roach residence.

Furthermore, police found conclusive evidence that he had used the same method in both the attempted break-in and the successful break-in of the Roach apartment.¹² That was convincing evidence of a common scheme or plan to break in somewhere that night and admissible as evidence in the Roach trial. The trial court did not err by allowing its admission.

IX. MOTION FOR CONTINUANCE¹³

The next issue concerns the trial court's denial of appellant's motion for a continuance under Tenn.R.Crim.P. 16(d)(2). The appellant asserts that the state failed to turn over certain pieces of evidence pursuant to a discovery motion filed a year prior to the hearing. In his brief, he claims that the prosecution withheld an audiotape containing an interview with the victim, Patricia Ann Roach, as well as information regarding Ms. Roach's initial identification of an individual other than the appellant as the perpetrator of the crimes committed against her. Arguing that these items constituted exculpatory evidence material to the preparation of a defense, the appellant asserts that he was entitled to the information Tenn.R.Crim.P. 16(a)(1)(C),¹⁴ and the United States Supreme Court's holding in Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the

¹²Police found identical pry marks on both the neighbor's door and Ms. Roach's door.

¹³This issue applies only to the Roach case.

¹⁴"Upon request of the defendant, the state shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of his defense or are intended for use by the state as evidence in chief at the trial, or were obtained from or belong to the defendant." Tenn.R.Crim.P. 16(a)(1)(C).

prosecution."). Because the state failed to comply with Rule 16, the appellant contends that he was entitled to relief under Tenn.R.Crim.P. 16(d)(2).¹⁵ in the form of a continuance. The trial court's refusal to grant that remedy, the appellant charges, constituted an abuse of discretion, as well as a violation of his due process rights.

This Court has explicitly held that "[t]he grant or denial of a motion for continuance rests within the sound discretion of the trial judge [and, h]is determination will not be overturned unless there is a clear showing of abuse of that discretion." State v. Butler, 795 S.W.2d 680, 684 (Tenn.Crim.App. 1990). See also State v. Green, 613 S.W.2d 229, 684 (Tenn.Crim.App. 1980). Indeed, within the context of Tenn.R.Crim.P. 16(d)(2), we have stated that "the trial court has great discretion in fashioning a remedy," State v. James, 688 S.W.2d 463, 466 (Tenn.Crim.App. 1984), a remedy that "must fit the circumstances of the individual case." State v. Cadle, 634 S.W.2d 623, 625 (Tenn.Crim.App. 1982). So, the language of Rule 16(d)(2) explicitly provides that trial courts are vested with wide discretion in determining exactly what sort of relief ought to be granted in particular circumstances. According this well-established discretion the deference it is due, we find that a complaining party cannot prevail on appeal where a motion for continuance has been denied, unless it can be shown (1) that he did not receive a fair trial, and (2) that a different result might reasonably have occurred had the continuance been granted. Butler, supra, 795 S.W.2d at 684, citing Maxwell v. State, 501 S.W.2d 577, 577, 580 (Tenn.Crim.App. 1973), which cited Higgins & Crownover, Tennessee Procedure in Law

¹⁵"If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms or conditions as are just." Tenn.R.Crim.P. 16(d)(2).

Cases § 885. Hence, it is well established that an appellant bears a heavy burden in attempting to convince an appellate court to overrule a trial judge's denial of a continuance in any context.

Contrary to the appellant's allegations, the record indicates that the appellant not only possessed the information he claims the state withheld from him, but also examined and otherwise utilized it in the course of the trial. As to the tape-recorded statement made by Ms. Roach, the state concedes that the cassette was inadvertently lost somewhere between the police station and the District Attorney General's office. However, the transcript of the hearing held January 4, 1990, reveals that Mr. Bryson, one of the police officers, provided the appellant's counsel with a three-page summary of the contents of Ms. Roach's statement, which he had prepared from the tape-recording which was subsequently lost. Further, the record shows that appellant's counsel examined the officer about the accuracy of the summary, which admittedly was not a transcript of the statement:

Q. And then you took the tape recording and from the tape recording you went back to your office and you made this report, which is State's Exhibit 7. You made that from the tape recording, is that right?

A. Yes, sir.

Q. And you recognize how important it is that the reports you make about an incident be correct and accurate?

A. Yes, sir.

Q. And you recognize that this report is one that should be correct and accurate.

A. To the best of my knowledge.

Q. And you made every effort to make it just as correct and accurate as you possible could.

A. Yes, sir.

Q. And going even further to make sure you made it

correct and accurate, you took a tape recording of what Ms. Roach told you, is that right?

A. Yes, sir.

Q. And you didn't leave anything out of --

A. Off the tape, no, sir.

So while the state was unable to provide the actual tape-recording of the statement, it did provide the appellant a summary of its contents, which the appellant's counsel used at trial. Thus, the evidence was not withheld from the appellant.

Indeed, the facts of this case resemble those in Hester v. State, 562 S.W.2d 214, 215 (Tenn.Crim.App. 1977). There, the state offered as evidence information taken from a tape-recorded conversation between the defendant and an undercover police officer regarding the sale of stolen merchandise. However, before a copy of that conversation could be conveyed to defense counsel pursuant to the discovery rule, the officer inadvertently taped over the recording in question. In response to this incident, the officer immediately informed the defense counsel of the mishap, told them everything he knew about the case and the conversation, and provided photocopies of notes he made on the night the offense was committed, including information about the telephone conversation, and his subsequent meeting with Mr. Hester and a co-defendant. Because the defense counsel was provided full discovery of the available information regarding the lost evidence, Judge Daughtrey, writing for this Court, affirmed the trial court's admission of the evidence, finding there was "sufficient compliance" with the applicable discovery procedures.

By analogy, a similar conclusion must follow in this case. The state provided the appellant's counsel with all the information it had regarding the tape-recorded statement and the appellant was able to use

that information at trial. Therefore, he cannot assert that it was improperly withheld or denied to him.

With respect to the information regarding Ms. Roach's initial identification of a man other than the appellant, the record also indicates that appellant's counsel not only possessed the information he claims was withheld, but also used it at trial. Indeed, the transcript of the hearing on January 4, 1990, illustrates that the appellant's counsel questioned Mr. Turner about the misidentification. The details elicited by defense counsel in the questioning of the officer reflect a prior awareness of the evidence in question, tending corroborate the state's assertion that it had provided the appellant's counsel with the requested information.

Because the evidence shows that the state did, in fact, comply with all discovery orders, the appellant's assertion that certain evidence was withheld lacks merit. Accordingly, his due process claim under Brady, supra, cannot be sustained, nor can his assertion that the trial judge abused his discretion in denying the motion for a continuance.

X. SUFFICIENCY OF THE EVIDENCE

Asserting that insufficient evidence existed to support his conviction for aggravated rape, the appellant challenges the correctness of the jury verdict of guilty returned in the Gore case. Specifically, he contends that the state failed to prove penetration, as well as infliction of personal injury, two elements of the offense of aggravated rape. Tenn. Code Ann. § 39-2-603 [repealed and superseded by Tenn. Code Ann. § 39-13-502].¹⁶

¹⁶(a) Aggravated rape is unlawful sexual penetration of a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances: (1) Force or coercion is used to accomplish the act and the defendant is armed with a weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a weapon; (2) The defendant causes bodily injury to the victim; (3) The defendant is aided or abetted by one (1) or more other persons; and (A) Force or coercion is used to accomplish the act; or (B) the defendant knows or has reason to know that the victim is

Relying on Hardin v. State, 210 Tenn.116, 355 S.W.2d 105, 107-108 (1962), the appellant asserts that his conviction is unjustified because each element of the crime was not proven beyond a reasonable doubt.

Where the sufficiency of the evidence is challenged, this Court must determine whether a rational trier of fact could find from the evidence that the appellant was guilty as to each element of the offense beyond a reasonable doubt. Jackson v. Virginia. 443 U.S. 307, 314-324, 99 S.Ct. 2781, 2786-2792, 61 L.Ed.2d 560 (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985); Tenn.R.App.P. 13(e). When examining the evidence, we note that it is not the province of this Court to reweigh the evidence presented. State v. Hatchett, 560 S.W.2d 627, 630 (Tenn. 1978), nor are we to substitute our inferences for those drawn by the jury. Liakas v. State, 199 Tenn.298, 286 S.W.2d 856, 859 (Tenn. 1956). It is well established that the jurors, as factfinders, bear the responsibility of weighing evidence, resolving conflicts and determining the credibility of the testimony presented. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); Farmer v. State, 574 S.W.2d 49, 51 (Tenn.Crim.App. 1978); Byrge v. State, 575 S.W.2d 292, 295 (Tenn.Crim.App. 1978). And because a jury verdict, approved by the trial court, accredits the testimony of the state's witnesses, all conflicts must be resolved in a fashion consistent with the state's theory of the case. State v. Williams, 667 S.W.2d 405, 410 (Tenn. 1983). Accordingly, on review, this Court recognizes that "all conflicts in testimony ... are resolved in favor of the state, and that ... the state is entitled to the strongest legitimate view of the ... evidence and all reasonable inferences which may be drawn therefrom." State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

mentally defective, mentally incapacitated or physically helpless. ..." Tenn. Code Ann. § 39-13-502.

The crime of aggravated rape requires proof of "unlawful sexual penetration," as well as any one of the enumerated aggravating circumstances. Tenn. Code Ann. § 39-2-603 [repealed and superseded by Tenn. Code Ann. §39-13-502(a)]. Citing a medical report made by the physician who examined Ms. Gore, the appellant points out that the report's writer explicitly recalled a statement supposedly made by Ms. Gore to the effect that sexual penetration had not occurred. On the basis of the report, the appellant argues that the essential element of penetration was not proven beyond a reasonable doubt in this case.

A review of the trial transcript, however, clearly contradicts the appellant's assertion. On cross-examination by the appellant's counsel, Dr. Lisa Molina, the examining physician, stated under oath that the remark in the report, which suggested that no sexual penetration occurred, was incorrectly recorded.

Q. Dr. Molina, referring to that report you referred to earlier where you've listed your history of physical findings.

A. Right.

Q. Could you read the fourth line under there?

A. "patient states, no vaginal, anal, oral penetration."

Q. So, she told you that there was no vaginal, anal or oral penetration?

A. I think that this statement is incorrect.

Q. Who wrote it?

A. I wrote it. I wrote an incorrect statement, and the incorrect statement may have been secondary to miscommunication between myself and the patient.

Q. But what you wrote at the time was she told you that there was no vaginal, anal or oral penetration.

A. That statement's incorrect.

The doctor's testimony thus eliminated the credibility of the written statement on which the appellant relies in asserting that sexual penetration was not proven.

Further, the doctor testified on redirect that Ms. Gore explicitly stated that penetration had occurred. In fact, the victim, Ms. Gore clearly testified to that effect. Additionally, Dr. Molina told the jury that she would not have ordered a pregnancy test nor would she have treated Ms. Gore for sexually transmitted disease had there been no penetration.

Considering all of this evidence, we find that any rational trier of fact could find beyond a reasonable doubt that the appellant sexually penetrated Ms. Gore and the claim that penetration was not proven is without merit.

The appellant also argues that the state failed to prove that he physically injured Ms. Gore. Because infliction of personal injury is an aggravating circumstance which must be proven beyond a reasonable doubt in order to support a conviction for aggravated rape, Tenn. Code § 39-2-603(a) [repealed and superseded by Tenn. Code Ann. § 39-13-502(a)], the appellant asserts that insufficient evidence existed to support the jury's verdict of guilt in this case.

The appellant properly notes that the rape itself may not constitute "personal injury" for purposes of establishing an aggravating circumstance. Any contrary holding would eliminate the distinction between rape and aggravated rape. Clearly, that was not the intention of the legislature, as evidenced by the passage of two separate statutes which set forth two separate criminal offenses. See Tenn. Code Ann. §§ 39-2-603 (aggravated rape) and 39-2-604 (rape) [repealed and superseded by Tenn. Code Ann. §§ 39-13-502 (aggravated rape) and 39-13-503 (rape)].

The cited aggravated rape statute provides that any one of three

conditions can provide the requisite aggravating circumstance for establishing aggravated rape. The appellant has noted that Tenn. Code Ann. § 39-2-603(a)(2)[repealed], establishes the infliction of personal injury as one such circumstance. However, the cited section also provides that aggravation exists where the defendant uses force or coercion to commit the crime, Tenn. Code Ann. § 39-2-603(a)(3)[repealed] and when the defendant employs a weapon to frighten the victim into submission. Tenn. Code Ann. § 39-2-603(a)(1)[repealed]. The evidence in this case clearly shows that the appellant placed a knife to Ms. Gore's throat and that he possessed the weapon throughout the commission of the crime. So, while no signs of physical injury were observed on Ms. Gore's person, an aggravating circumstance was nonetheless present by the appellant's use of a weapon to perpetrate the crime.

Because a rational trier of fact could reasonably find beyond a reasonable doubt that the appellant threatened Ms. Gore with a knife, sufficient to supply an aggravating circumstance, we hold that appellant's claim to the contrary is without merit. Accordingly, his issue as to the sufficiency of the evidence used to convict him is without merit.

The appellant also alleges a fatal variance between the indictment and the evidence introduced at trial. Specifically, he notes that the indictment charged him with aggravated rape which "caused personal injury to Patricia Ann Gore." Because the state failed to prove that the appellant inflicted personal injury on Ms. Gore, he argues that the state failed to prove the allegations presented in the indictment.

Where a variance exists between an indictment and the evidence offered at trial, it is well-established that the defendant must prove that the

variance was material and prejudicial for the variance to be fatal. For prejudice to be shown, the defendant must demonstrate that the variance (1) misled him at trial or (2) rendered him liable to another prosecution for the same offense. State v. Moss, 662 S.W.2d 590, 592 (Tenn. 1984), citing numerous cases.

In this case no variance exists between the indictment and the proof offered at trial. Rather, it appears that the state merely failed to prove one of the alternative allegations of the indictment - proof of which was unnecessary to convict the appellant of the crime with which he was charged. The indictment showed the state's intention to prosecute him for the crime of aggravated rape. To that end, it alleged that the appellant sexually penetrated Patricia Ann Gore and that aggravating circumstances were present, namely the use of a weapon, "to-wit: a knife" and the infliction of personal injury. Because proof of only one aggravating circumstance was necessary to convict the appellant of aggravated rape, the state's failure to prove the other aggravating circumstance, personal injury, was of no moment. Thus, the state successfully proved the required elements of the crime with which the appellant was charged.

Because no evidence was offered at trial which would tend to prove an allegation not presented in the indictment, no variance exists in this case. The state merely failed to prove one of the alternative allegations lodged against the appellant in the indictment -- proof of which was unnecessary to convict him of the crime of aggravated rape. Furthermore, because the appellant has not been exposed to a risk of double jeopardy nor has he been misled, he cannot prevail on this issue. Therefore, appellant's argument to the contrary is without merit.

XI. VARIANCE

The appellant also asserts that a fatal variance existed between the indictment in the Roach case and the evidence introduced at trial. Specifically, he argues that the language of the indictment suggested that personal injury was caused to Ms. Roach as a result of the act of sexual penetration itself. Because the state failed to present evidence to this effect and instead proved injury caused by blows to the face and arm, the appellant contends that the variance is fatal.

As stated in the previous section, a variance between an indictment and the evidence offered at trial is fatal where the accused is misled thereby or is exposed to the danger of double jeopardy. State v. Moss, Id. The appellant has failed to prove prejudice by either of those standards.

The indictment at issue provided as follows: "That Harold Wayne Nichols heretofore on the 3rd day of January, 1989, in the County aforesaid, did unlawfully and feloniously engage in sexual penetration, to-wit: Fellatio with Patricia Ann Roach, thereby causing personal injury to Patricia Ann Roach, against the peace and dignity of the State." A second indictment pertaining to a charge of aggravated rape by anal penetration is worded in substantially the same fashion. The language of both indictments could be read to suggest that the personal injury caused in this case resulted directly from the act of penetration itself, since the word "thereby" is used. However, the state proved only that the appellant inflicted personal injury on Ms. Roach when he struck her twice and pulled her arm once. No proof was introduced to show any injury resulting from either penetration.

In spite of this, the appellant has suffered no prejudice. In the first place, he has not been exposed to a risk of double jeopardy. Also, he has not shown that he was misled by the language of the indictment. Indeed,

his own arguments prove the contrary.

First, the appellant emphatically and correctly argues that the act of rape itself cannot supply the personal injury needed to establish aggravated rape. However, his reading of the indictment contradicts that basic rule. The appellant's interpretation essentially charges the state with attempting to establish aggravated rape by merely proving penetration. But, knowing that this is insufficient to prove the charge against him, the appellant cannot now assert that the state's proof of personal injury by means others than penetration misled him. Indeed, the appellant has eloquently demonstrated his understanding of the proof the state was required to present in order to convict him of aggravated rape.

Finally, the appellant in his reply brief explicitly conceded that Ms. Roach testified that he inflicted personal injury to her by striking her on the face and arm. His admission clearly refutes any suggestion that he was misled by the language of the indictment.

Because the appellant has failed to demonstrate any prejudice as a consequence of the variance at issue here, his argument lacks merit.

XII. THE TRIAL COURT ERRED WHEN IT REFUSED TO DECLARE A MISTRIAL AFTER THE DISTRICT ATTORNEY GENERAL CALLED ANOTHER VICTIM TO THE STAND RATHER THAN THE VICTIM IN THIS CASE.

The appellant next contends that the judge erred by not granting his motion for a mistrial when the prosecutor inadvertently called the

wrong name when calling the victim to the stand.¹⁷ The record indicates that counsel for the state mistakenly called the name of Patricia Ann Gore rather than Patricia Ann Roach when calling the victim to the stand to testify. However, there is no evidence that this mistake made the jury aware that there was another case pending against the appellant.¹⁸

In order for a prosecutorial error of this kind to constitute reversible error, a court must consider the following factors: (1) the conduct complained of viewed in context and in light of the facts and circumstances of the case; (2) the curative measures undertaken by the court and prosecution; (3) the intent of the prosecutor in making the improper statement; (4) the cumulative effect of the improper conduct and any other errors in the record; and (5) the relative strength or weakness of the case. State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984), approving the factors set forth by this Court in Judge v. State, 539 S.W.2d 340, 344 (Tenn.Crim.App. 1976).

The defense argues that the state's slip of the tongue informed the jurors of at least one more case against the appellant and that doing so violated his right to a fair trial by prejudicing the jury. In McLean v. State, 527 S.W.2d 76, 84 (Tenn. 1975), the Court held that proof of other crimes is "highly prejudicial" and, therefore, is to be "received with caution." The reason for the rule is clear. The jury is likely to conclude that the defendant is a "bad person" who is likely to have committed the charge in the indictment if he is shown to have committed other crimes. The

¹⁷This section refers to the Roach case only.

¹⁸The reason for the error is obvious, given the fact that both victims were named "Patricia Ann."

defense also argues that the state and the court failed to undertake any curative measures and that this error taken in the aggregate with all the other errors made by the state in these proceedings, justifies a reversal.

The state's characterization of this situation is most convincing. There is absolutely nothing in the record to indicate that the jury was aware that Patricia Ann Gore was a victim in another case involving the appellant. The obvious similarity between the names, i.e., Patricia Ann Gore vis-a-vis Patricia Ann Roach, is more indicative of a simple mistake by the prosecutor rather than an intentional and contrived slip. Since this appears to have been a natural and harmless mistake, the state's apology and correction immediately after the incident was adequate curative action. Indeed, such slips are common in trials when counsel inadvertently call witnesses, parties, other counsel, and even the judge by an erroneous name.

Finally, the decision to grant a mistrial is within the sound discretion of the trial court and will not be disturbed on appeal unless there is an abuse of that discretion. State v. Jones, 733 S.W.2d 517, 522 (Tenn.Crim.App. 1987). Generally, a mistrial will be declared only if there is "manifest necessity" requiring such action by the trial judge. Id., citing Arnold v. State, 563 S.W.2d 792, 794 (Tenn.Crim.App. 1977). There was no "manifest necessity" requiring a mistrial in this case. Indeed, there was no necessity at all. The state simply confused two very similar names and used the wrong surname in calling the witness to the stand. This mistake in no way informed the jury that there were other cases pending against the appellant and in no way prejudiced the appellant. This issue has no merit.

XIII. THE TRIAL COURT ERRED WHEN IT REFUSED TO FORBID THE FORMAL READING OF THE INDICTMENT.

The appellant contends that the formal reading of the indictment placed undue emphasis upon it, thereby destroying the presumption of innocence enjoyed by the defendant in a criminal case.¹⁹ The defense generally invokes the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, §§ 8, 9, and 16 of the Tennessee Constitution, and a North Carolina statute as authority for his position.²⁰ He points to no provision in either constitution to support his argument. Even though North Carolina was the mother state of Tennessee, the State of Tennessee has been a separate jurisdiction since 1796. North Carolina statutes are not the law in Tennessee and we find nothing in the United States Constitution or the Tennessee Constitution which prohibits the formal reading of the indictment in a criminal case. As the state noted in its brief, it has long been the practice in Tennessee to read the indictment to the jury before presenting the state's evidence. State of Tennessee v. Charlie Burks, Tennessee Criminal Appeals, opinion filed at Jackson, October 4, 1984, citing S. Gilreath and B. Aderholt, Caruthers' History of a Lawsuit § 740 (8th ed. 1963). The trial court was simply following long established procedures by allowing the reading of the indictment.

In addition, the trial judge took extra precautions by instructing the jury that the indictment is simply the formal written accusation that the appellant committed a crime, not evidence creating any inference of guilt against the one charged in the indictment. In light of this precaution, it

¹⁹This section applies to the Roach case only.

²⁰The cited North Carolina statute provides that "(a)t no time during the selection of the jury or during trial may any person read the indictment to the prospective jurors or the jury." N.C.Gen.Stat. § 15A-1221(b). North Carolina case law holds that the only prohibition is that the indictment may not be read. It does not prohibit reference to its contents. State v. Carr, 283 S.E.2d 175, 176 (N.C.App. 1981). The opinion also suggests there may be a constitutional problem (without intimating whether it is the United States Constitution or the North Carolina Constitution to which the Court refers) with the statute. Id.

cannot really be argued that the appellant was prejudiced in any way by allowing the state to follow the long established procedure used throughout Tennessee. This issue has no merit.

XIV. VOIR DIRE STATEMENT

During voir dire in the Roach case, a prospective juror indicated her inability to remain impartial if selected to sit on the jury. When questioned by the prosecutor, the prospective juror revealed that she had been a rape victim about sixteen years earlier while an adolescent. When asked whether, in light of her experience, she would be capable of remaining impartial in this case, she responded, "I don't think I would be fair because it [the rape] was done exactly the same way to me[.] I would just like to see him [Mr. Nichols] disappear, to be honest." The court excused the prospective juror and the appellant's counsel requested that the entire jury panel be stricken on the ground that her statement prejudiced all of the other prospective jurors.

Relying on State v. Scruggs, 589 S.W.2d 899, 901 (Tenn. 1979), the appellant contends that the prospective juror's statement prejudiced the entire jury panel, warranting the striking of that panel. In Scruggs, our Supreme Court reversed the defendant's conviction of armed robbery and remanded the case for a new trial because one of the prospective jurors revealed during voir dire that he once served as the defendant's probation officer. The court held that that information so prejudiced the defendant that a new trial was required.

The appellant's reliance on Scruggs for the contention that he should be given a new trial is misplaced. What concerned the Supreme Court in Scruggs was the effective admission in voir dire of evidence regarding the defendant's past conduct -- evidence that was not only

inadmissible at that stage of the proceeding, but also highly prejudicial. In that case the court reasoned that the prospective juror's statement informed the jury of the defendant's prior conviction and sentence, which the jury could have taken into consideration when considering the evidence in the case. Because the jury imposed a sentence of two and one-half times the minimum sentence, the Court inferred that they had been unduly influenced by the information divulged during voir dire.²¹

Not only is this case factually dissimilar to Scruggs, but also lies outside the scope of concern which generated the Supreme Court's decision in that case. Here, the prospective juror's comments revealed an inability to remain impartial by virtue of her own past experience, which was completely unrelated to this case and to this appellant. She did not disclose any information regarding the appellant's past activities or those which related to his indictments in this case. Indeed, she, like the rest of the jury panel, indicated at the beginning of voir dire that she did not know the appellant. Her statement simply declared to the court and the panel that her prior experiences -- experiences totally unrelated to this case -- prevented her from remaining impartial in a rape case. Thus, because her statement in no way revealed information concerning the appellant's character or past conduct, she did not say anything prejudicial about this appellant.

Further, the appellant has failed to demonstrate any prejudice from her statement. The appellant makes only general assertions with no substantiating evidence. In fact, his defense counsel inquired of the remaining panel members whether they, like the excused prospective juror, would be unable to remain fair and impartial. Counsel elicited no

²¹At the time of Scruggs, juries determined guilt or innocence and, in the event of conviction, set the punishment.

response from any of the potential jurors to the effect that they shared her inability to fairly judge a rape case. Hence, there was no evidence that the statement prejudiced the jury in any way.

Because the comment during voir dire neither amounted to an inadmissible statement which could prejudice this appellant nor prejudiced the jury panel in any other way, the appellant has failed to meet the Scruggs criteria for reversal of his conviction. Accordingly, the issue has no merit.

All of the appellant's issues lack merit. Accordingly, the judgments are affirmed.

JERRY SCOTT, PRESIDING JUDGE

CONCUR:

JOE B. JONES, JUDGE

ADOLPHO A. BIRCH, JR., JUDGE