IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER 1995 SESSION

STATE OF TENNESSEE,	)	
	)	
APPELLEE,	)	
	)	No. 01-C-01-9506-CC-00194
	)	
	)	Williamson County
v.	)	
	)	Donald P. Harris, Judge
	)	
	)	(Sentencing)
MARK BORUM,	)	
	)	
APPELLANT.	)	

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OPINION FILED:_____

AFFIRMED AS MODIFIED

Joe B. Jones, Presiding Judge

O P I N I O N

The appellant, Mark Borum, was convicted of two (2) counts of aggravated rape, a Class A felony, one (1) count of aggravated robbery, a Class B felony, and one (1) count of aggravated burglary, a Class C felony, following his pleas of guilty to these offenses. The trial court found that the appellant was a standard offender and imposed the following sentences:

a) Count 1, aggravated rape, confinement for twenty-five (25) years in the Department of Correction;

b) Count 2, aggravated rape, confinement for twenty-five (25) years in the Department of Correction;

c) Count 3, aggravated robbery, confinement for eight (8) years in the Department of Correction; and

d) Count 4, aggravated burglary, confinement for six (6) years in the Department of Correction.

The sentences in Counts 1 and 2 are to be served concurrently. The sentences in Counts 3 and 4 are to be served concurrently to each other and consecutively to the sentences in Counts 1 and 2. The effective sentence imposed was confinement for thirty-three (33) years in the Department of Correction.

Two issues are presented for review. The appellant contends that the sentences imposed are excessive. He also contends that the trial court abused its discretion by ordering consecutive sentencing.

The judgment of the trial court is affirmed as modified. The sentences for aggravated rape are reduced from twenty-five (25) years to twenty-one (21) years; and the sentence for aggravated burglary is reduced from six (6) years to three (3) years. The sentence for aggravated robbery, eight (8) years, will not be disturbed. All of the sentences are to be served concurrently.

The appellant was thirty-nine years of age when he was sentenced. He has been married for thirteen and one-half years. No children have been born to this union. The appellant received a Bachelor of Science Degree and Masters in Education from Middle

Tennessee State University. He also has earned in excess of eighty (80) hours towards a doctorate degree in English. The latter credits were earned at Ohio University. The appellant and his wife amassed approximately $80,000 in student loans for their educational pursuits. They also had incurred approximately $13,000 indebtedness through the use of credit cards.

During the course of the appellant's education, he has taught at the high school level and at the college level. He was a teaching associate at Middle Tennessee State University and Ohio University. He was selected by the students as teacher of the year at Ohio University. In addition, he participated in children's summer school programs for three summers. When he commenced a sabbatical following the spring semester in 1994, the appellant and his wife made jewelry. They sold the jewelry at craft fairs. Neither the appellant nor his wife had regular employment in June of 1994.

The appellant's mother-in-law died in Georgia in June of 1994. He went to the funeral with his wife. While in Atlanta, he began thinking about "robbing a house." He purchased a toy plastic pistol and two pair of women's hose in Atlanta. As he drove from Atlanta to Franklin for a dental appointment on June 16, 1994, he thought about what he might encounter and what he would have to do. He said at his sentencing hearing he never thought of raping a victim. Following the dental appointment, the appellant drove through an affluent neighborhood in Brentwood.

The appellant saw a lady, D.P., taking the mail from her mailbox. He noticed there was only one car in the garage. Shortly thereafter, the appellant drove his car into the driveway of D.P.'s home. He left the motor running. He placed a stocking over his head and entered the residence through the door leading from the garage to the kitchen. The appellant told the victim to lay on the floor. At first, she thought it was a friend of her son's playing a cruel joke on her. Later, she realized the person was a stranger. The victim thought she would be killed by the perpetrator. She did not know the appellant's gun was a toy plastic pistol.

When the victim laid on the floor face down, the appellant tied her hands behind her back with the other hose. He then turned the victim onto her back, removed her shorts and undergarments, and placed the shorts over her head so that she could not see him. He

made her talk "dirty" and "profane" to him. He performed cunnilingus upon the victim. He then vaginally penetrated the victim. The victim testified that the appellant placed the gun to her temple on two occasions to make her cooperate. He placed a pair of scissors on a chair so the victim could cut herself loose once he left the residence.

The appellant asked the victim where she kept the valuables. She remembered that there was an envelope containing $260 in a dresser drawer. She gave the appellant detailed instructions so he could find the money and, hopefully, exit the residence. As the appellant was descending the stairs from the upstairs bedroom, the victim's husband returned home from a business trip to Chattanooga. The victim's husband and the appellant saw each other at approximately the same time. The appellant pointed the gun at the victim's husband and made a noise. The husband thought the appellant had fired the weapon at him. The husband and the appellant exited the residence through separate doors simultaneously. The appellant ran to his car and drove away. The victim's husband returned to the residence and called 911 to report the crime. The Brentwood Police Department notified surrounding law enforcement agencies to look for the vehicle and the person that the victim's husband had described.

Officers of the Franklin Police Department located the appellant's vehicle and gave chase. The appellant threw the plastic gun out and over the top of his car before he was stopped by the police. The plastic gun was retrieved by the officers. Later, the appellant gave the investigating officers of the Brentwood Police Department a confession. While the appellant told the officers that he was monogamous and he had neither AIDS nor the AIDS' virus, he voluntarily provided the officers with a blood specimen so that it could be tested to determine if he had this illness or a venereal disease. He also provided a blood specimen so DNA testing could be performed. The test results positively identified the appellant as the person who had vaginally penetrated the victim.

The appellant said he never thought he would actually commit the robbery. He never contemplated rape until he was inside the residence. At his sentencing hearing, the appellant testified that he used a toy pistol because he did not want anyone to get hurt. He elected to burglarize a residence because of the likelihood that no one would get hurt and the crime would be easier to commit. When asked why he did not rob a convenience

market, the appellant testified that these businesses have large volumes of traffic entering and exiting, and, furthermore, the chance of someone being injured or harmed was greatly enhanced. The appellant was emphatic in his confession and his testimony that he did not want to hurt anyone.

Several people appeared and testified in support of the appellant. Others were present but did not testify as their testimony would have been repetitious. Some of those present and others wrote letters to the court in support of the appellant. Most of these individuals had know the appellant for several years.

The individuals supporting the appellant condemned the crimes that the appellant committed. However, they wanted the trial court to know the person they knew. All of these people described the appellant as an intelligent, kind, fun-loving, gentle, loving, and likeable person who cared about others. His brother described him as a person who wanted to make other people feel good and laugh even if it was at the appellant's expense. The appellant had never engaged in violent conduct in the past. He had never hit or harmed his wife. The appellant's sister-in-law testified that she thought the appellant was motivated by the couple's large indebtedness and the death of his mother-in-law with whom the appellant was close.

Those close to the appellant stated he had deep, sincere remorse for his conduct. The appellant expressed this during his testimony. He apologized to the victim and her family for what he had done. He said he wished he could take his actions back, but he knew that was impossible. He further stated that justice demands he serve a lengthy term in the Department of Correction as a consequence of his actions. He also thanked his wife, family, and friends for the assistance they had given him during his ordeal.

It was the consensus of those writing letters and testifying that the appellant needed to be treated for his condition by a psychiatrist or a psychologist for an extended period of time. They also agreed that if this treatment was given, the appellant could be rehabilitated, and, when released, the appellant could conduct himself as a model citizen. While no one thought the appellant would ever engage in conduct like or similar to the offenses of which he stands convicted, they expressed the view that the appellant would not engage in such conduct in the future.

The appellant testified that he wanted to get to the prison so that he could get professional help. He expressed a desire to overcome his conduct. The appellant testified that he would cooperate fully with prison officials and any doctors assigned to assist him.

I.

When an accused challenges the length and manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The presumption does not apply to the legal conclusions reached by the trial court in sentencing the accused or to the determinations made by the trial court which are predicated upon uncontroverted facts. State v. Butler, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); State v. Smith, 891 S.W.2d 922, 929 (Tenn. Crim. App.), per. app. denied (Tenn. 1994); State v. Bonestel, 871 S.W.2d 163, 166 (Tenn. Crim. App. 1993). However, this Court is required to give great weight to the trial court's determination of controverted facts as the trial court's determination is based upon the witnesses' demeanor and appearance.

In conducting a de novo review of a sentence, this Court must consider (a) any evidence received at the trial and/or sentencing hearing, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offense, (f) any mitigating or enhancing factors, (g) any statements made by the accused in his own behalf, and (h) the accused's potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-103 and -210; State v. Scott, 735 S.W.2d 825, 829 (Tenn. Crim. App.), per. app. denied (Tenn. 1987).

When the accused is the appellant, the accused has the burden of establishing that the sentence imposed by the trial court was erroneous. Sentencing Commission Comments to Tenn. Code Ann. § 40-35-401; Ashby, 823 S.W.2d at 169; Butler, 900 S.W.2d at 311.

II.

When an accused is convicted of a Class C, D, or E felony and is sentenced as an especially mitigated offender or a standard offender, there is a presumption, rebuttable in nature, that the accused is a favorable candidate for alternative sentencing options. Tenn. Code Ann. §40-35-102(6). In this case, the appellant was convicted of two Class A and one Class B felonies. The sentences for the Class A felonies do not permit consideration of alternative sentencing.

Since the appellant was convicted of a Class C felony, there was a presumption, rebuttable in nature, that he was a favorable candidate for alternative sentencing. Given the length of the sentences in the aggravated rape cases, which are Class A felonies, and the fact that aggravated robbery is a Class B felony, an academic dissertation on this issue would be an effort in futility. First, the appellant is not entitled to an alternative sentence in the aggravated rape cases due to the length of the sentences. Second, the effective sentence imposed by the trial court was not enlarged by the sentence in the aggravated burglary case. Third, when the sentences in the aggravated rape and aggravated robbery cases have been served, the appellant will be entitled to his release in the aggravated burglary case.

III.

The trial court found that three enhancement factors were applicable to the aggravated rape cases. The factors used to enhance the appellant's sentences were: (a) the appellant treated the victim with exceptional cruelty during the commission of the offenses, Tenn. Code Ann. § 40-35-114(5); (b) the appellant committed the two rapes to gratify his desire for pleasure or excitement, Tenn. Code Ann. § 40-35-114(7); and (c) the crimes were committed under circumstances where the potential for bodily injury to the victim was great. Tenn. Code Ann. § 40-35-114(16). The trial court also enhanced the aggravated burglary case based upon the appellant's use of a weapon during the commission of the offense. Tenn. Code Ann. § 40-35-114(9). The aggravated robbery case was enhanced based upon the fact the offense involved more than one victim. Tenn.

Code Ann. § 40-35-114(3). The trial court found that there were no mitigating circumstances, and the robbery and rape cases each aggravated the other.

The appellant contends that the trial court considered a factor that is not enumerated as an enhancement factor and misapplied other factors. He contends that the use of one crime to aggravate the other is not a listed enhancement factor. He further contends that enhancement factor (3) was wrongfully applied because there was only one victim; enhancement factor (5) was wrongfully applied because he did not treat the victim with extreme cruelty; the state failed to prove enhancement factor (7); and enhancement factor (16) is not supported by the record.

A.

The only factors that can be used to enhance a sentence within the appropriate range are the factors contained in Tenn. Code Ann. § 40-35-114. State v. Strickland, 895 S.W.2d 85, 89 (Tenn. Crim. App. 1993), per. app. denied (Tenn. 1994); State v. Dykes, 803 S.W.2d 250, 258-59 (Tenn. Crim. App.), per. app. denied (Tenn. 1990). One of the goals of the Tennessee Criminal Sentencing Reform Act of 1989 was to "assure fair and consistent treatment of all defendants by eliminating unjustified disparity in sentencing and providing a fair sense of predictability of the criminal law and its sanctions." Tenn. Code Ann. § 40-35-102(2). This goal could not be accomplished if trial courts were permitted to enhance sentences within the appropriate range for reasons outside the statute. Thus, if the trial court intended to enhance one offense committed by the appellant because he committed another offense as part of the same criminal episode, it was an erroneous enhancement of the offenses.

B.

The trial court properly used enhancement factor (7) because it is obvious that the appellant committed the two aggravated rapes for his personal gratification or enjoyment. The appellant made the victim lay face down on the floor while he tied her hands. He then

placed his hands on her buttocks and commented: "I need to check this out." He immediately turned the victim over so that she was facing him. He removed her shorts and undergarments and placed them over her head. He demanded that she talk "dirty" to him. He fondled her breasts and performed cunnilingus upon her. He then vaginally penetrated her. Thus, the state established this factor. See State v. Adams, 864 S.W.2d 31, 34-35 (Tenn. 1993).

The trial court properly applied enhancement factor (5). The evidence establishes that the appellant treated the victim with exceptional cruelty during the commission of the offense. On two separate occasions the appellant placed what the victim thought was a real gun to her temple in an effort to make her cooperate while he raped her. This conduct went beyond the elements of the offense. The victim submitted to the appellant, followed his directions, laid on the floor as directed, had her hands tied behind her back, and was threatened by the appellant with the gun. The victim thought on both occasions that the appellant would kill her unless she did precisely as the appellant ordered. This was sufficient to establish this factor.

C.

The trial court used factor (16) to enhance the punishment in the rape cases. This factor permits the enhancement of a sentence within the appropriate range when the "crime was committed under circumstances under which the potential for bodily injury to a victim was great." Tenn. Code Ann. § 40-35-114(16). In State v. Smith, 891 S.W.2d 922 (Tenn. Crim. App.), per. app. denied (Tenn. 1994), where the accused was convicted of aggravated burglary and aggravated rape, this Court held that this factor should not be applied in a conviction for aggravated rape unless there are extraordinary circumstances in addition to the elements of the crime. In Smith this Court said:

> "The General Assembly has seen fit to enhance the punishment for aggravated burglary and aggravated rape. In doing so, the General Assembly recognized that the potential for bodily injury to the victim is great when these crimes are committed. Thus, a trial court should not apply this factor absent extraordinary circumstances. There are no extraordinary circumstances in this case which warrant the

> application of this factor. The trial court properly refrained from using this factor to enhance the appellant's sentence for aggravated rape but improperly applied it to the aggravated burglary. . . .

891 S.W.2d at 930-31. Thus, the trial court should not have used this factor to increase the appellant's sentences for aggravated rape.

D.

The state concedes that the sentence in the burglary case should not have been enhanced on the ground the appellant used a weapon. Factor (9) states that a sentence may be increased in the appropriate range when the "defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense." Tenn. Code Ann. § 40-35-114(9). It is uncontradicted that the appellant used a toy plastic pistol. Thus, this factor should not have been applied in the burglary case.

As for the sentence in the robbery case, the application of enhancement factor (3) presents a complex issue. The application of this factor was predicated upon the victim's husband returning to the residence while the robbery was in progress. It is not disputed that when the husband returned from a business trip and entered the residence, the appellant had been to the bedroom, obtained the money from a dresser drawer, and was about to exit the residence. When the appellant and the victim's husband made eye contact, the appellant pointed the toy pistol at him. In short, the robbery had been completed when the husband appeared. Moreover, the state charged the appellant with an assault against the husband but a nolle prosequi was later entered. The husband was not named in the robbery count of the indictment. After much consternation, this Court is of the opinion that this factor should not have been used to enhance the robbery conviction since the offense had been completed and the appellant was leaving the premises.

E.

The trial court found that there were no mitigating factors. This Court is of the

opinion that there are mitigating factors supported by the record. First, the appellant committed all of these offenses under such unusual circumstances that it is highly unlikely that a sustained intent to violate the law motivated his conduct. The appellant expressed surprise that he actually committed the offenses in question. He did not feel that he could commit such an offense. Tenn. Code Ann. § 40-35-113(11). He has also expressed remorse. Tenn. Code Ann. § 40-35-113(13).

IV.

The trial court ordered that the two aggravated rape convictions should be served consecutively to the aggravated robbery conviction. According to the trial court, the appellant is a dangerous offender. Tenn. Code Ann. § 40-35-115(b)(4).

An accused qualifies as a dangerous offender when his "behavior indicates little or no regard for human life, and [he has] no hesitation about committing a crime in which the risk to human life is high." Tenn. Code Ann. § 40-35-115(b)(4); see Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976). In this case, most of the offenses the appellant committed qualified him as a "dangerous offender." However, this fact, standing alone, will not justify consecutive sentencing. State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995); State v. Woods, 814 S.W.2d 378, 380 (Tenn. Crim. App.), per. app. denied (Tenn. 1991). As the Supreme Court said in Wilkerson:

> As previously stated in this opinion, the imposition of consecutive sentences on an offender found to be a dangerous offender requires, in addition to the application of general principles of sentencing, the finding that an extended sentence is necessary to protect the public against further criminal conduct by the defendant and that the consecutive sentences must reasonably relate to the severity of the offenses committed.

905 S.W.2d at 939; see State v. Taylor, 739 S.W.2d 227, 230 (Tenn. 1987).

In the context of this case, consecutive sentencing was not warranted. The appellant used a toy plastic pistol because he did not want to hurt anyone. He did not attempt to inflict physical injury to the victim. To the contrary, he placed a pair of scissors in close proximity to the victim so that she could free herself after he exited the residence.

Moreover, the overwhelming weight of the evidence is that the appellant can be rehabilitated.

The appellant had lived an exemplary life prior to the commission of these offenses. He is highly intelligent and has almost finished the required courses to obtain a doctorate degree in English. He is supported by his wife, his relatives, his wife's relatives, and the friends that know him. They spoke of the appellant they knew. He was described as a kind, gentle, loving, and docile person. He had never committed a violent act in the past. The appellant had assisted many individuals in the past and wanted others to be happy even if it meant joking about himself. He was given tremendous responsibility by his professors while teaching at Ohio University. He used his summers to teach in a program for children. The students at Ohio University selected him as the teacher of the year. Every witness testified that the conduct in question was out of character for the appellant. He expressed extreme remorse and apologized to the victim and her husband.

While the appellant refused to make excuses for his conduct, it is quite apparent that he was motivated by the large debt that he and his wife had amassed. They had $80,000 in student loans outstanding. In addition, there was $13,000 in credit card debts. Neither he nor his wife had a job at the time. They were trying to make a living by manufacturing jewelry and selling the jewelry at craft fairs.

This Court finds that all of the sentences imposed by the trial court should be served concurrently. Consecutive sentencing is not required in this case to "protect the public against further criminal conduct" on the part of the appellant, and the consecutive sentences imposed by the trial court did not "reasonably relate to the severity of the offenses" he committed. Wilkerson, 905 S.W.2d at 939.

CONCLUSION

This Court finds that there are two enhancement factors and two mitigating factors present in the aggravated rape cases. Given the weight the trial court gave to the enhancement factors, the sentences in these cases should be reduced from twenty-five (25) years to twenty-one (21) years. The sentence in the aggravated burglary case should

be reduced to the minimum sentence. The sentence for aggravated burglary is reduced from six (6) years to three (3) years. The sentence in the aggravated robbery case, eight (8) years, is the minimum for that offense. All of the sentences are to be served concurrently. The effective sentence is confinement for twenty-one (21) years in the Department of Correction.

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JOE B. JONES, PRESIDING JUDGE

CONCUR:

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JOHN H. PEAY, JUDGE

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JOSEPH H. WALKER, III, SPECIAL JUDGE